



INTERIOR BOARD OF INDIAN APPEALS

Sharon Wasson, Thomas R. Wasson, Andrea Davidson, and Elverine Castro
v. Acting Western Regional Director, Bureau of Indian Affairs

39 IBIA 174 (10/27/2003)

Related Board cases:

38 IBIA 205

38 IBIA 255

42 IBIA 141



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SHARON WASSON, THOMAS R.	:	Order Denying Request under
WASSON, ANDREA DAVIDSON, and	:	25 C.F.R. § 900.159 for
ELVERINE CASTRO,	:	Extension of Time to File
Appellants	:	Notice of Appeal
v.	:	
	:	
ACTING WESTERN REGIONAL	:	Docket No. IBIA 03-142-A
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee	:	October 27, 2003

Appellants Sharon Wasson, Thomas R. Wasson, Andrea Davidson, and Elverine Castro sought review of a July 11, 2003, decision of the Acting Western Regional Director, Bureau of Indian Affairs (Regional Director; BIA), declining to contract programs under the Indian Self-Determination Act (ISDA). For the reasons discussed below, the Board of Indian Appeals (Board) denies Appellants' request for an extension of time in which to file a notice of appeal. The Regional Director's July 11, 2003, decision is therefore final for the Department of the Interior.

Despite the fact that Appellants have not followed 43 C.F.R. § 4.317(b) in raising this issue, the Board finds that it must nonetheless address their allegation that the Administrative Judge to whom this appeal was assigned is biased against them. Appellants' allegation is based on the fact that the Judge stated in a previous order that the appeal concerned an internal dispute within the Colony. Appellants allege that the Colony does not have an internal dispute and that a statement that it does is "inherently prejudicial" to them. Sept. 24, 2003, Request to File Appeal at 3.

Appellants are not recognized by BIA as members of the Colony's Tribal Council. In other proceedings, they are opposing BIA's recognition of a Tribal Council. Appellants apparently object to the statement that this is an "internal" dispute because they assert that the currently recognized Tribal Council consists in whole or in part of non-members of the Colony and/or non-Indians.

The Board finds that there is a dispute over the recognition of the Colony's Tribal council. It further finds that the use of the term "internal" in describing that dispute does not prove bias. Appellants' request that the Judge be removed from this case because she used the term "internal" is denied.

The Board turns to the question of whether Appellants' notice of appeal was timely. The timeliness of a notice of appeal is governed by the regulations under which the appeal was filed. This appeal was filed under the ISDA regulations in 25 C.F.R. Part 900. Therefore, the timeliness of the filing of the notice of appeal is governed by the Part 900 regulations. ^{1/} In order to be timely filed under the ISDA regulations, a notice of appeal must be filed within 30 days of the appellant's receipt of the decision. 25 C.F.R. § 900.158(a). The date of filing a notice of appeal is the date of mailing. 25 C.F.R. § 900.158(b).

On August 25, 2003, the Board received a letter and notice of appeal from Appellants. The package was postmarked August 19, 2003; the letter was dated August 18, 2003; and the notice of appeal was dated August 5, 2003. The letter states: "By inadvert[ent] mistake, this appeal was posted to the wrong address. Since the Interior Department has not renewed the forwarding message to the Post Office and, even though the Post Office had the correct address for the forward, it was returned."

The Board asked BIA for a copy of the return receipt card for the copy of the Regional Director's July 11, 2003, decision sent to Appellants. It was informed that the card either had not yet been received or had been misplaced. Based on the non-availability of the return receipt card, in a September 3, 2003, order, the Board informed Appellants, among other things, that they would be required to show that their appeal was timely filed.

Appellants responded by arguing that the Regional Director sent his July 11, 2003, decision to Appellant Thomas Wasson, rather than to his attorney. They alleged that this resulted in delayed receipt of the decision. They continued:

The [Board's] address was included in the [Regional Director's decision] letter but it was not the same address counsel had just used at the end of last year to file an appeal. Counsel attempted to verify the address but the Department of Interior website was unavailable. The Bureau of Indian Affairs website was unavailable.

^{1/} This is so even though, subsequent to the filing of the notice of appeal, the Board determined under 25 C.F.R. § 900.160(b) that this particular appeal would proceed under 43 C.F.R. Part 4, Subpart D, rather than being referred for an evidentiary hearing.

The appeal was posted with the United States mail on August 5, 2003. If the filing had been returned in the regular course of mailing by the United States Post Office, the Appellant would have had notice of the incorrect address in plenty of time to re-file the appeal. The appeal was posted fully two weeks prior to its due date. Instead the Post Office took more than a month to return the filing and included the new address without forwarding the material to the Office of Hearings and Appeals.

Finally, the letter returning and re-filing the matter with the Office of Hearings and Appeals was mailed two days before the date that the appeal was due according to the date of receipt. The Office claims not to have received it for over a week, on August 25, 2003. The date of receipt of the letter from the [Regional Director] is the date from which the thirty days begins to run. We know, indeed, that Thomas Wasson * * * received the letter by August 5, 2003 because that is the date that the appeal was filed. There is no proof that * * * Wasson received the document prior to that date since no copy was sent to counsel for the Colony in order to verify the date. The appeal was timely filed * * *.

Sept. 24, 2003, Request to File Appeal at 2.

Subsequent to Appellants' September 24, 2003, filing, BIA received or located Thomas Wasson's return receipt card for the July 11, 2003, decision. The card showed that the decision was signed for on July 17, 2003. Accordingly, based on the evidence of the return receipt card, the Board concludes that the starting date for the 30-day appeal period is July 17, 2003. It rejects Appellants' arguments to the extent that they allege or argue for a later starting date.

Thirty days from July 17, 2003, was Saturday, August 16, 2003. Therefore, Appellants had until the end of the next business day, Monday, August 18, 2003, in which to file their notice of appeal. 43 C.F.R. § 4.310(c), incorporated by 25 C.F.R. § 900.160(b).

Appellants' notice of appeal was not postmarked on or before August 18, 2003. If this appeal had not been filed under the ISDA regulations, the Board would conclude at this point that the notice of appeal was not timely filed. However, under 25 C.F.R. § 900.159, the Board can grant an extension of time for filing an appeal in an ISDA matter. Section 900.159 requires that the request for an extension of time be filed within 60 days of the appellant's receipt of the decision, and provides that the appellant "shall give a reason for not filing its notice of appeal within the 30-day time period. If the [appellant] has a valid reason for not filing its notice of appeal on time, it may receive an extension from the [Board]." Based on this regulation, the Board treats the totality of Appellants' filings as a request for an extension of time to file a notice of appeal. Specifically, it treats Appellants' arguments in support of their contention that

their notice of appeal was timely as reasons why they believe that they should be granted an extension of time for filing their notice of appeal.

The Board considered section 900.159 in Seminole Nation of Oklahoma v. Acting Eastern Oklahoma Regional Director, 37 IBIA 154 (2002). Finding that the regulation itself was not clear as to what constituted a “valid” reason for requesting and granting an extension of time, the Board looked for guidance in the preamble to the publication of the final Part 900 regulations. It found the following statement:

One comment recommended deletion of Sec. 900.159 because any request for an extension should be made within the 30-day time frame in Sec. 900.158. This recommendation was not adopted because, although a matter of considerable debate during the [Negotiated Rulemaking] Committee’s negotiations, it was agreed that there could be extenuating circumstances that could prevent a[n] Indian tribe or tribal organization from filing its notice of appeal within the 30-day time frame in Sec. 900.158.

See 61 Fed. Reg. 32482, 32497 (June 24, 1996). The Board held:

The Committee made it clear in this statement that it did not intend to authorize the routine filing of requests for extensions of time. Further, by providing in the regulation itself that a tribe may be granted an extension of time, the Committee expressed its intent to vest the Board with discretion in determining whether an extension of time should be granted.

In the exercise of its authority under 25 C.F.R. § 900.159, the Board construes the regulation with the aid of the above-quoted statement from the preamble and concludes that, in order to establish a valid reason for not filing a timely notice of appeal, a tribe must show that extenuating circumstances prevented it from doing so. The key concept here is the concept of “prevention.” It is not enough that a tribe show that it was inconvenient for it to prepare and file a timely notice of appeal. Rather, it must show that it was actually precluded from filing a timely notice of appeal.

Further, the tribe must do more than simply allege in summary fashion that it was prevented from filing a timely notice of appeal by some particular circumstances. It must support its allegation with an explanation of how and why the described circumstances prevented it from filing a timely notice of appeal.

37 IBIA at 155.

The Board considers Appellants' arguments in light of this precedent.

Appellants allege that the Regional Director erred by sending the decision to Thomas Wasson rather than to counsel, and that this service resulted in delayed receipt of the decision. Clearly, Thomas Wasson received the July 11, 2003, decision in time to transmit it to his counsel on or before August 5, 2003, the date on which counsel signed the notice of appeal. The Board finds that service of the Regional Director's decision on Thomas Wasson, rather than on counsel, does not constitute a valid reason for granting an extension of time for filing a notice of appeal.

Appellants contend that the Department of the Interior and BIA erred in not having their Internet websites available so that counsel could verify the Board's address. Certain websites of the Department of the Interior, including the Board's, have been off-line by court order since December 2001. Although parts of the Department's website are now back on-line, the Board does not know the date on which those parts were reconnected. However, an Internet website is not the only source of information as to the addresses for Departmental offices. It was Appellants' choice not to avail themselves of any of those other resources. The Board finds that the unavailability of certain Departmental websites does not constitute a valid reason for granting an extension of time for filing a notice of appeal.

Appellants assert that the Office of Hearings and Appeals (OHA) and/or the Board erred in not "renewing" its mail forwarding order with the United States Postal Service (USPS). OHA moved in February 2002. Forwarding orders were in effect with the USPS from the date of the move in accordance with USPS rules and regulations. OHA amended 25 and 43 C.F.R. to reflect its new address. In his July 11, 2003, decision, the Regional Director provided Appellants with the Board's correct mailing address. Assuming for purposes of this order that forwarding orders with the USPS are "renewable," the Board finds that OHA's non-renewal of those forwarding orders does not constitute a valid reason for granting an extension of time for filing a notice of appeal.

Appellants argue that the USPS erred in not forwarding their misaddressed filing to the Board's new address, and in not returning the filing earlier. Although the Board is not authorized to review actions of the USPS, it appears that the USPS fulfilled its obligation to Appellants by returning their misaddressed first-class mail. The Board notes that the letter resending Appellants' notice of appeal contained the Board's correct address and was dated August 18, 2003. It thus appears that Appellants had verification from the USPS of the Board's correct mailing address in time to file a timely notice of appeal. The Board finds that the failure of the USPS to forward Appellants' misaddressed notice of appeal to the Board or to return the filing to Appellants faster does not constitute a valid reason for granting an extension of time for filing a notice of appeal.

The Board thus finds that Appellants have failed to present a valid reason as to why they should be granted an extension of time for filing a notice of appeal in this ISDA matter. Therefore, it finds that Appellants have failed to file a timely notice of appeal.

Appellants state that if their notice of appeal is found to be untimely, they will just refile their request for an ISDA contract, which will repeat the appeal process. If Appellants disagree with a Board decision, their proper recourse is in Federal court. Under the Colony's present circumstances, it might be the case that a more productive course of action for Appellants to take would be to continue to work for a resolution of the enrollment and leadership disputes facing the Colony. In this regard, although the Board is aware that mediation was ordered by the United States Court of Appeals for the Ninth Circuit in a related case, it still believes that alternate dispute resolution (ADR) can be very beneficial in resolving both tribal enrollment issues and tribal government disputes. It therefore urges Appellants to consider the possibility of suggesting the use of some form of ADR in attempting to resolve the Colony's issues as an alternative or supplement to the myriad court proceedings that have been, are, and will be pending. If they wish, Appellants, or any other party, may contact the Board for information about how the Department's Office of Collaborative Action and Dispute Resolution might be able to assist them in locating a non-Departmental neutral party or to otherwise facilitate the use of ADR.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1 and 25 C.F.R. § 900.159, the Nation's request for an extension of time in which to file a notice of appeal is denied. Accordingly, the Regional Director's July 11, 2003, decision is final for the Department of the Interior.

//original signed
Kathleen R. Supernaw
Acting Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge